Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1195

UNITED STATES OF AMERICA,
Respondent,

vs.

WALTER WOLAK, JR.,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DOHERTY & THOMAS, P.C.
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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. .....

UNITED STATES OF AMERICA,
Respondent,
vs.
WALTER WOLAK, JR.,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Now comes WALTER WOLAK, JR., by and through counsel, PHILIP J. DOHERTY of DOHERTY & THOMAS, P.C., respectfully submitting this Petition for Writ of Certiorari and says as follows:

OPINION

The Order of the United States Court of Appeals for the Sixth Circuit is unreported at the time. A copy of the Order, denying Petitioner's appeal, is included in the Appendix to this, Petitioner's Petition for Writ of Certiorari. That Order was filed January 24, 1978.

JURISDICTION

The grounds on which the jurisdiction of this Honorable Court is invoked by your Petitioner include the following:

A) On January 24, 1978, the United States Court of Appeals for the Sixth Circuit affirmed the conviction of WALTER WOLAK, JR., in the case of *United States* v. *Walter Wolak, Jr.*, No. 77-1381 (6th Cir. 1978).

B) The statutory provision which confers jurisdiction on this Court to review the judgment of the United States Court of Appeals for the Sixth Circuit is contained in 28 U.S.C.A. § 1254(1), which reads as follows:

"By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

STATUTORY PROVISION

18 U.S.C.A. App. §§ 1, et seq. (1970).

STATEMENT OF FACTS

Appellant Wolak was serving a sentence at the State Prison of Southern Michigan, at Jackson, Michigan, when he was arraigned, pursuant to a writ of habeas corpus ad prosequendum, before a United States Magistrate in the Eastern District, Southern Division of Michigan (Detroit), on an indictment charging him with a violation of 21 U.S.C. §§ 846 and 841(a)(1). The Appellant was returned

to Jackson Prison on April 20, 1973. A trial date was set for June 27, 1973, and the Appellant was again transported to Federal custody in Detroit on that date to stand trial, but the trial was postponed until August 25, 1973. Appellant was then returned to State custody on July 6, 1973.

On August 7, 1973, Appellant, represented by counsel, entered a plea of guilty to one (1) count of the indictment. On October 16, 1973, he was sentenced to a five (5) year term, to run concurrently with his State sentence and to be followed by a special parole term of three (3) years.

As a result of a successful petition to the Sixth Circuit challenging the guilty plea,[1] a Superseding Indictment was issued against Appellant on May 27, 1975, and on a second guilty plea entered March 4, 1976, Appellant was sentenced on May 3, 1976, to the same term he received originally, his term to run from the same date, October 16, 1973.

On February 14, 1976, Appellant moved to vacate his sentence pursuant to 28 U.S.C.A. § 2255, based upon violation of his rights under Article IV (e) of the Interstate Agreement on Detainers, 18 U.S.C.A. App. §§ 1, et seq. (1970) (hereinafter referred to as "IADA").

The United States District Court for the Eastern District of Michigan denied Appellant's motion. The Court held that assuming a violation of Article IV (e) occurred, Appellant waived his right not to be returned to State custody without a trial by failing to timely raise the alleged violation of the IADA before his guilty plea.

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1. *United States* v. *Wolak*, 510 F.2d 164 (6th Cir. 1975). The Court held that it was improper not to inform Defendant of the maximum possible prriod of incarceration and other consequences of his guilty plea.

The Sixth Circuit affirmed the holding of the District Court but on different grounds. The Sixth Circuit did not rule that the Appellant is estopped from raising the substantive issue because he plead guilty. In fact, the Court addressed the issue as to whether a writ of habeas corpus ad prosequendum constitutes a detainer within the meaning of the IADA. The Court, in saying it does not, never addressed the issue of waiver.[2]

REASONS FOR GRANTING WRIT

The instant petition treats a question of statutory interpretation of vital importance necessitating a decision by this Honorable Court.

The question presented is "whether the requirements of the Interstate Agreement on Detainers, 18 U.S.C.A. App. §§ 1, et seq. (1970), are applicable to persons whose Federal custody was obtained by means of a writ of habeas corpus ad prosequendum, 28 U.S.C.A. § 2241(c)(5)".

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2. Appellant would contend that insofar as the Sixth Circuit addressed the substantive issue, the District Court's holding with report to waiver is not now before this Honorable Court. Furthermore, there has been case law to the effect that a plea of guilty does not operate to preclude a defendant from thereafter raising a claim respecting a violation of his rights under the IADA. *See United States* v. *Mauro*, 544 F.2d 588 (2nd Cir. 1976); *United States* v. *Cyphers*, 566 F.2d 360 (2nd Cir. 1977); *United States* v. *Randall*, 429 F. Supp. 18 (D.D.C. 1977); *Enright* v. *United States*, 434 F. Supp. 1056 (S.D.N.Y. 1977).

In *Humphrey* v. *Cady*, 405 U.S. 504 (1972), this Honorable Court was presented with the question of whether an attorney had validly waived a client's right. This Court, in remanding to the District Court for an evidentiary hearing, pointed out that "a waiver must be the product of an understanding and knowing decision by the petitioner himself, who is not necessarily bound by the decision or default of his counsel." *Id.* at 517. (Counsel, in the instant case, first became involved when the Motion to Vacate sentence was filed.) *See also Johnson* v. *Zerbst*, 304 U.S. 458 (1938).

Finally, Article IX of the IADA says "[t]his agreement shall be liberally construed so as to effectuate its purposes."

The Interstate Agreement on Detainers is a comprehensive statute that was drafted in response to the problems a prisoner faces when there are open criminal charges pending against him in another jurisdiction. *See United States* v. *Ford*, 550 F.2d 732, 737-741 (2nd Cir. 1977).

Article I of the Agreement provides:

> "The party States find that charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party States also find that proceedings with reference to such charges and detainers, while emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures." 18 U.S.C.A. App. § 2, Art. I.

See also Sen. Rep. No. 91-1356, 91st Cong., 2nd Sess. 4864-4865 (1970), which elucidates on the problems an inmate faces against whom a detainer has been lodged:

> "To implement the right to a speedy trial and to minimize the interference with a prisoner's treatment and rehabilitation, the Agreement creates several rights previously non-existent." *United States ex rel. Esola* v. *Groomes*, 520 F.2d 830, 833 (3rd Cir. 1975).

Specifically, Article IV was designed to provide a simplified procedure for the demanding State to gain the presence of a defendant for purposes of trial. Article IV (a), essentially required that a request for custody of an inmate be honored by the sending State absent affirmative interference by the governor of the confining institution. Article IV (c) requires that any trial instigated by the use of Article IV (a) be commenced within one hundred twenty (120) days. Finally, Article IV (e) provides that if the trial is not held prior to the prisoner's being returned to the sending State, then the "indictment, information or complaint shall not be of any further force or effect, and the Court shall dismiss the same with prejudice." 18 U.S.C.A. App. § 2, Art. IV (e) (1970). *See United States ex rel. Esola* v. *Groomes,* 520 F.2d, at 834.

Notwithstanding the availability of the IADA, often the Government will use the traditional habeas writ to obtain prisoners for trial.[3] Accordingly, a split has developed in the Circuits as to whether the requirement of the Agreement applies only to detainers and not to Federal writs of habeas corpus ad prosequendum.[4]

The Sixth, First, Fifth, and Eighth Circuits have held that the filing of such a writ does not constitute a detainer. *See Ridgeway* v. *United States,* 558 F.2d 357 (6th Cir. 1977); *United States* v. *Kenaan,* 557 F.2d 912 (1st Cir.

3. 28 U.S.C.A. § 2241(c)(5) provides:

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

(5) It is necessary to bring him into court to testify or for trial."

4. The United States is a "state" within the meaning of the Agreement. 18 U.S.C.A. App. § 2, Art. II (a). In *United States* v. *Mauro,* 544 F.2d 588, 593 (2nd Cir. 1976), *cert. granted,* 46 U.S.L.W. 3183 (U.S. Oct. 4, 1977) the Court held that the United States is both a sending and a receiving state.

1977); *United States* v. *Scallion,* 548 F.2d 1168 (5th Cir. 1977); *United States* v. *Harris,* 566 F.2d 610 (8th Cir. 1977).

The Second and Third Circuits have held that the filing of the writ of habeas corpus ad prosequendum constitutes a detainer and invokes the application of the IADA. *See United States* v. *Sorrell,* 562 F.2d 227 (3rd Cir. 1977); *United States* v. *Thompson,* 562 F.2d 232 (3rd Cir. 1977); *United States* v. *Mauro,* 544 F.2d 588 (2nd Cir. 1976), *cert. granted,* 46 U.S.L.W. 3183 (U.S. Oct. 4, 1977).

The First Circuit in *United States* v. *Kenaan, supra,* concluded that the differences between a detainer and a writ of habeas corpus ad prosequendum are so fundamental "as to constitute each a separate, distinct avenue for obtaining custody of prisoners for Federal prosecution." 557 F.2d at 915. The Second Circuit, however, in *United States* v. *Mauro, supra,* reasoned that, although the habeas writ is the traditional vehicle used to obtain custody of State prisoners, "it does not follow that the habeas writ is not a detainer within the Agreement." 544 F.2d at 591.

The definition of the term "detainer" is not found in the IADA. However, Congressman Kastenmeier, in proposing this legislation, stated:

> "For the purpose of this legislation a detainer is a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to stand trial on pending criminal charges in another jurisdiction." 116 Cong. Rec. 13999 (1970). *See also* S. Rep. No. 91-1356, 91st Cong., 2nd Sess., 3 U.S. Code Cong. and Admin. News 4864, 4865 (1970).

The Court in *Mauro,* in analyzing the above statement, noted that this was the type of notification found

in the writ of habeas corpus ad prosequendum they had before them. 544 F.2d at 591.

However, it has been argued that, whereas a detainer historically was an informal notice procedure that did not bind the holding authorities, the writ of habeas corpus ad prosequendum originally, and at present, is a court order directing the production of a State prisoner to stand trial in Federal Court. *Ridgeway* v. *United States,* 437 F. Supp. 564, 567-569 (W.D.Mo. 1977).

Yet, notwithstanding the compulsory nature of the writ, vis-á-vis a detainer, "the jurisdiction to which such a writ is addressed is relied upon to cooperate in turning over the defendant to the other authorities." *United States* v. *Oliver,* 523 F.2d 253, 258 (2nd Cir. 1975). *See also Carbo* v. *United States,* 364 U.S. 611, 621 (1961). Thus, when both methods are actually employed, one wonders whether the actual procedures and implementation are so inherently different, especially now under the IADA. Furthermore, it seems reasonable to conclude that the abuses for which the IADA was designed to protect against are just as real if the inmate is brought into Federal custody pursuant to a writ of habeas corpus ad prosequendum and returned without being tried.

The Third Circuit in *United States ex rel. Esola* v. *Groomes, supra,* held that the IADA provided the exclusive means of transfer between two (2) participating jurisdictions. 520 F.2d at 837. In addition, Article IX of the Act provides that the Agreement "shall be liberally construed so as to effectuate its purposes", which are stated in Article I.

Against this is to be considered the decisions which have held that a writ of habeas corpus ad prosequendum is not a detainer within the meaning of the IADA. The

result of such divergent views is a situation which may, in the same fact situation, produce diametrically opposite results. Accordingly, it is necessary for this Honorable Court to submit a decision that would breathe uniformity and consistency into a serious situation.

It is the Appellant's position that when the Government seeks to obtain the custody of a State prisoner for purposes of trial in a Federal Court, the means of transfer must be the IADA. To do otherwise would leave important legislation with form and no substance, a shell devoid of the means to guard against the abuses it was designed to protect against.

As pointed out in *United States* v. *Mauro, supra*:

> "In view of the clear language of Article IV (e), we believe the Agreement was plainly designed to avoid the shuttling of prisoners back and forth between the penal institutions of the two jurisdictions. The disruptive effect upon the prisoner's morale is the same irrespective of the caption on the paper which produces him in the jurisdiction seeking him for trial." 544 F.2d at 593.

RELIEF

Wherefore, Petitioner respectfully requests this Honorable Court to grant Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

DOHERTY & THOMAS, P.C.
PHILIP J. DOHERTY (P 12839)
225 South Main Street
Royal Oak, Michigan 48067
(313) 543-3404
Attorney for Petitioner

APPENDIX

No. 77-1381

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

WALTER WOLAK, JR.
Defendant-Appellant

ORDER

(Filed January 24, 1978)

BEFORE: EDWARDS, ENGEL and MERRITT, Circuit Judges.

The defendant-appellant Walter Wolak contends on appeal that a writ of habeas corpus ad prosequendum constitutes a "detainer" under the Interstate Agreement on Detainers, 18 U.S.C. App. §§1, et seq. (1970). Finding that the issue raised on this appeal is controlled by our decision in *Ridgeway* v. *United States,* 558 F.2d 357 (6th Cir. 1977) holding that a writ of habeas corpus ad prosequendum issued in the normal course of pre-trial proceedings is not such a "detainer" under the Interstate Agreement on Detainers, and finding therefore that the question raised on this appeal is unsubstantial under Rule 9, Rules of the Sixth Circuit and does not need further argument, the judgment of the court below denying defendant-appellant's motion to vacate sentence is hereby affirmed.

Entered by Order of the Court

/s/ John P. Hehman
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Criminal No. 5-80909

UNITED STATES OF AMERICA,
Plaintiff,

v.

WALTER WOLAK, JR.,
Defendant.

MEMORANDUM OPINION

(Filed April 8, 1977)

The court's docket in this cause reflects that on April 19, 1973, the United States Marshal, pursuant to a writ of habeas corpus ad prosequendum, transported petitioner from the State Prison of Southern Michigan at Jackson to the United States Courthouse for arraignment before a magistrate on an indictment charging violation of 21 U.S.C. §§846 and 841(a)(1) and 18 U.S.C. §2. Petitioner was returned to the state prison on the day following his arraignment, April 20, 1973. On June 27, 1973, the United States Marshal again transported petitioner to the United States Courthouse for trial on those charges. The trial did not go forward on that day, rather a subsequent trial date was set for August 28, 1973. On August 7, 1973, however, petitioner, represented by counsel, entered a guilty plea to one count of that indictment. He entered into a Rule 11 agreement with the government limiting his sentence to five years. On October 16, 1973, he was sentenced upon his guilty plea.

In his petition, filed pursuant to 28 U.S.C. §2255, petitioner contends, for the first time, that this sequence of events violated Article IV(e) of the Interstate Agree-

ment on Detainers Act (IADA) and, therefore, the court was without jurisdiction to try him or to impose sentence. Article IV(e) provides that when a prisoner is obtained from a sending jurisdiction and then returned to that jurisdiction without having been tried, the indictment pending in the receiving jurisdiction "shall be of no further force or effect and the court shall enter an order dismissing the same with prejudice." Thus, petitioner argues that the act of returning him to the State Prison of Southern Michigan without trial violated Article IV(e) of the IADA.

Assuming that a violation of Article IV(e) occurred, we, nevertheless, conclude that petitioner waived his right not to be returned to Jackson without trial by failing to timely raise the alleged violation of IADA before his guilty plea. A timely motion would have effectuated the underlying purposes of the IADA. Raising the violation for the first time in a post-conviction proceeding cannot advance any purpose for which the IADA was passed. Any harm to petitioner's rehabilitation program would have already occurred. We are persuaded that when Congress enacted the IADA it did not intend that relief be available to petitioners who assert a violation for the first time in a post-conviction proceeding.

We are aware that the United States Court of Appeals for the Second Circuit in *United States* v. *Cyphers*, No. 76-1131 (2d Cir. filed Feb. 8, 1977) held that a defendant who alleged a violation of the Interstate Agreement on Detainers Act for the first time on appeal from his conviction after trial in the district court did not waive this objection. In so doing, the court found that the policy behind Article IV(e) of providing for expeditious resolution of all outstanding charges which may affect the conditions or duration of confinement overrode the waiver provisions of Rule 12(f), Fed. R. Crim. P., Slip Op. at 1745.

It is significant that the court did not hold that the violation of IV(e) was jurisdictional. *Cyphers*, however, does not support petitioner's position in the case at bar. The defendant in *Cyphers* went to trial. Article IV(e), by protecting the defendant from being constantly shuttled between the sending and receiving jurisdictions, facilitates communication between the defendant and his lawyer and thus preparation of the defense. In the case at bar, there was no defense presented. Petitioner pled guilty. Thus, the policy considerations present in *Cyphers* are absent here. A guilty plea represents a break in the chain of events which preceded it in the criminal process and precludes the defendant from raising independent claims which occurred prior to the entry of the plea. *Tollett* v. *Henderson*, 411 U.S. 258, 266-67 (1973); *Burrows* v. *Engle*, No. 76-1690 (6th Cir. filed Dec. 1, 1976).

Accordingly, IT IS ORDERED that petitioner's motion to vacate sentence be and the same hereby is dismissed.

/s/ Robert E. DeMascio
Robert E. DeMascio
United States District Judge

Dated: April 8, 1977

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CR. # 48565

UNITED STATES OF AMERICA,
Plaintiff,

-vs-

WALTER WOLAK, JR.,
Defendant.

PETITION FOR WRIT OF HABEAS CORPUS AD PROSEQUENDUM

TO: THE HONORBALE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN:

THE CLERK OF THE COURT FOR THE EASTERN DISTRICT OF MICHIGAN:

NOW COMES THE UNITED STATES OF AMERICA by Ralph B. Guy, Jr. United States Attorney, and Peter J. Kelley, Assistant United States Attorney, for the Eastern District of Michigan, and respectfully shows as follows:

That THURSDAY, APRIL 19, 1973, at 11:00 A.M., is the date and time set for the arraignment of defendant herein.

That said defendant is now an inmate at State Prison of Southern Michigan, Jackson, Michigan;

WHEREFORE, your petitioners pray that a Writ of Habeas Corpus Ad Prosequendum be directed to the WARDEN, STATE PRISON OF SOUTHERN MICHIGAN, JACKSON, MICHIGAN; MICHIGAN DEPARTMENT OF CORRECTIONS, LANSING, MICHIGAN; and the United

States Marshal for the Eastern District of Michigan, to produce the said defendant in the Courtroom of the Honorable Barbara K. Hackett, United States MAGISTRATE, Eastern District of Michigan, Southern Division, in the Federal Building, Detroit, Michigan, on THURSDAY, APRIL 19, 1973, at 11:00 A.M., for the above-stated purpose, and to be returned, safe and secure, to the custody of the law enforcement officers as directed by the Court.

Ralph B. Guy, Jr.
United States Attorney

/s/ Peter J. Kelley
By: Peter J. Kelley
Assistant United States Attorney

Let the Writ Issue As Prayed:

/s/ Cornelia G. Kennedy
United States District Judge

Dated: April 12 1973

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CRIMINAL NO. 48565

UNITED STATES OF AMERICA,
Plaintiff,

WALTER WOLAK, Jr.
Defendant.

WRIT OF HABEAS CORPUS AD PROSEQUENDUM

TO: WARDEN, STATE PRISON OF SOUTHERN MICHIGAN, JACKSON, MICHIGAN; MICHIGAN DEPARTMENT OF CORRECTIONS, LANSING, MICHIGAN;

and

UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF MICHIGAN.

YOU ARE HEREBY COMMANDED to produce WALTER WOLAK, JR., defendant herein, an inmate at STATE PRISON OF SOUTHERN MICHIGAN, JACKSON, MICHIGAN, in order that he may be available for arraignment in the above-captioned cause in the Courtroom of the Honorable Barbara K. Hackett, United States Magistrate, for the Eastern District of Michigan, Southern Division, on the 10th Floor of the Federal Building, Detroit, Michigan, on THURSDAY, APRIL 19, 1973, at 11:00 AM, and to remain until excused by the Court, and the said person to be returned, safe and secure, to the custody of the law enforcement officers, to be returned to the said prison, as directed by the Court.

WITNESS, the Honorable Cornelia G. Kennedy, United States District Judge for the Eastern District of Michigan, this 12th day of April, 1973.

Henry R. Hanssen, Clerk
United States District Court
/s/ (Illegible)
Deputy Clerk

(PJK 3113)

Habeas Corpus AD Testificandum
or AD Prosequendum

Received this writ on the 18 day of April 1973 at Detroit, Michigan and executed same, in part at Jackson, Michigan on 18 April 1973 by delivering a certified copy hereof to Warden of the Jackson State Prison and taking into custody the within named Walter WOLAK Jr. and returning to Detroit, Michigan as herein I am commanded.

Anthony E Rozman
U.S. Marshal
E/Mich.
By (Illegible)
Deputy

MARSHAL RETURN

I further executed this writ the 20 day of April 1973 at Detroit Michigan by taking into custody the within named Walter Wolak and returning him to the custody of the Warden of the States prison of Southern Jackson at Jackson Michigan this the 20 day of April 1973 as herein I am Commanded.

Anthony E Rozman
United States Marshal E/Mich
/s/ Jack R Wolf
By: Jack R Wolf
DUSM E/Mich

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CR. # 48565

UNITED STATES OF AMERICA,
Plaintiff,

-vs-

WALTER WOLAK, JR.,
Defendant.

PETITION FOR WRIT OF HABEAS CORPUS AD PROSEQUENDUM

TO: THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN:

THE CLERK OF THE COURT FOR THE EASTERN DISTRICT OF MICHIGAN:

NOW COMES THE UNITED STATES OF AMERICA by Ralph B. Guy, Jr., United States Attorney, Peter J. Kelley, Assistant Untied States Attorney, for the Eastern District of Michigan, and respectfully shows as follows:

That THURSDAY, APRIL 19, 1973, at 11:00 A.M., is the date and time set for the arraignment of defendant herein.

That said defendant is now an inmate at State Prison of Southern Michigan, Jackson, Michigan;

WHEREFORE, your petitioners pray that a Writ of Habeas Corpus Ad Prosequendum be directed to the WARDEN, STATE PRISON OF SOUTHERN MICHIGAN, JACKSON, MICHIGAN; MICHIGAN DEPARTMENT OF CORRECTIONS, LANSING, MICHIGAN; and the United

States Marshal for the Eastern District of Michigan, to produce the said defendant in the Courtroom of the Honorable Barbara K. Hackett, United States MAGISTRATE, Eastern District of Michigan, Southern Division, in the Federal Building, Detroit, Michigan, on THURSDAY, APRIL 19, 1973, at 11:00 A.M., for the above-stated purpose, and to be returned, safe and secure, to the custody of the law enforcement officers as directed by the Court.

Ralph B. Guy, Jr.
United States Attorney

/s/ Peter J. Kelley
By: Peter J. Kelley
Assistant United States Attorney

Let the Writ Issue As Prayed:

/s/ Cornelia G. Kennedy
United States District Judge

Dated: April 12 1973

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CRIMINAL NO. 48565

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WALTER WOLAK, Jr.
Defendant.

WRIT OF HABEAS CORPUS AD PROSEQUENDUM

TO: WARDEN, STATE PRISON OF SOUTHERN MICHIGAN, JACKSON, MICHIGAN; MICHIGAN DEPARTMENT OF CORRECTIONS, LANSING, MICHIGAN;

and

UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF MICHIGAN.

YOU ARE HEREBY COMMANDED to produce WALTER WOLAK, JR., defendant herein, an inmate at STATE PRISON OF SOUTHERN MICHIGAN, JACKSON, MICHIGAN, in order that he may be available for arraignment in the above-captioned cause in the Courtroom of the Honorable Barbara K. Hackett, United States Magistrate, for the Eastern District of Michigan, Southern Division, on the 10th Floor of the Federal Building, Detroit, Michigan, on THURSDAY, APRIL 19, 1973, at 11:00 AM, and to remain until excused by the Court, and the said person to be returned, safe and secure, to the custody of the law enforcement officers, to be returned to the said prison, as directed by the Court.

WITNESS, the Honorable Cornelia G. Kennedy, United States District Judge for the Eastern District of Michigan, this 12th day of April, 1973.

Henry R. Hanssen, Clerk
United States District Court

/s/ (Illegible)
Depty Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CR. # 48565

UNITED STATES OF AMERICA,
Plaintiff,

-vs-

WALTER WOLAK,
Defendant.

PETITION FOR WRIT OF HABEAS CORPUS AD PROSEQUENDUM

TO: THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN:

THE CLERK OF THE COURT FOR THE EASTERN DISTRICT OF MICHIGAN:

NOW COMES THE UNITED STATES OF AMERICA by Ralph B. Guy, Jr., United States Attorney, and Peter J. Kelley, Assistant United States Attorney, for the Eastern District of Michigan, and respectfully shows as follows:

That Wednesday, June 27, 1973 at 9:00 AM is the date and time set for the TRIAL OF WALTER WOLAK, above-named defendant;

That said defendant is now an inmate at State Prison of Southern Michigan, Jackson, Michigan;

WHEREFORE, your petitioners pray that a Writ of Habeas Corpus Ad Prosequendum be directed to the WARDEN, STATE PRISON OF SOUTHERN MICHIGAN, JACKSON, MICHIGAN; MICHIGAN DEPARTMENT OF CORRECTIONS, LANSING, MICHIGAN; and the United States Marshal for the Eastern District of Michigan, to produce the said defendant in the Courtroom of the Honorable CORNELIA G. KENNEDY, United States District Judge for the Eastern District of Michigan, Southern Division, in the Federal Building, Detroit, Michigan, on WEDNESDAY, JUNE 27, 1973, at 9:00 AM for the above-stated purpose, and to be returned, safe and secure, to the custody of the law enforcement officers as directed by the Court.

Ralph B. Guy, Jr.
United States Attorney

/s/ Peter J. Kelley
By: Peter J. Kelley
Assistant United States Attorney

Let the Writ Issue As Prayed:

/s/ Cornelia G. Kennedy
United States District Judge

Dated: June 26, 1973

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CRIMINAL NO. 48565

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WALTER WOLAK,
Defendant.

WRIT OF HABEAS CORPUS AD PROSEQUENDUM

TO: WARDEN, STATE PRISON OF SOUTHERN MICHIGAN, JACKSON, MICHIGAN; MICHIGAN DEPARTMENT OF CORRECTIONS, LANSING, MICHIGAN;

and

UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF MICHIGAN.

YOU ARE HEREBY COMMANDED to produce WALTER WOLAK, defendant herein, an inmate at State Prison of Southern Michigan, Jackson Michigan in order that he may be available for TRIAL in the above-captioned cause in the Courtroom of the Honorable Cornelia G. Kennedy, United States District Judge for the Eastern District of Michigan, Southern Division, on the 2nd Floor of the Federal Building, Detroit, Michigan, on WEDNESDAY, JUNE 27, 1973, at 9:00 AM, and to remain until excused by the Court, and the said person to be returned, safe and secure, to the custody of the law enforcement officers, to be returned to the said prison, as directed by the Court.

WITNESS, the Honorable Cornelia G. Kennedy, United States District Judge for the Eastern District of Michigan, this 26th day of June, 1973.

Henry R. Hanssen, Clerk
United States District Court
/s/ (Illegible)
Deputy Clerk

MARSHALS RETURN

Received this writ on the 27th day of June 1973, at Detroit, Michigan and executed same in part at Jackson, Michigan, on 27 June 1973 by Delivering a certified copy hereof to the Warden of the State Prison Southern Michigan, and taking into custody the within named Walter Wolak and returning same to the U.S. Marshals Office Detroit, Michigan as herein I am Commanded.

Anthony E. Rozman
United States Marshal
Eastern District of Michigan
/s/ Harry B. Westerdale Jr.
By: Harry B. Westerdale Jr.
Deputy U.S. Marshal

I further executed this writ on the 6 day of July, 1973, at Detroit, Mich. by taking into custody the within-named WALTER WOLAK and returning him to the custody of the Warden of the State Prison Southern Michigan, at Jackson Michigan, this the 6 day of July, 1973, as herein I am commanded.

Anthony E. Rozman
U.S. Marshal
Eastern District of Michigan
By: /s/ Brady Hawkins Jr.
Brady Hawkins Jr.
Deputy

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CRIMINAL NO. 48565

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WALTER WOLAK,
Defendant.

WRIT OF HABEAS CORPUS AD PROSEQUENDUM

TO: WARDEN, STATE PRISON OF SOUTHERN MICHIGAN, JACKSON, MICHIGAN; MICHIGAN DEPARTMENT OF CORRECTIONS, LANSING, MICHIGAN;

and

UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF MICHIGAN.

YOU ARE HEREBY COMMANDED to produce WALTER WOLAK, defendant herein, an inmate at State Prison of Southern Michigan, Jackson Michigan in order that he may be available for TRIAL in the above-captioned cause in the Courtroom of the Honorable Cornelia G. Kennedy, United States District Judge for the Eastern District of Michigan, Southern Division, on the 2nd Floor of the Federal Building, Detroit, Michigan, on WEDNESDAY, JUNE 27, 1973, at 9:00 AM, and to remain until excused by the Court, and the said person to be returned, safe and secure, to the custody of the law enforcement officers, to be returned to the said prison, as directed by the Court.

WITNESS, the Honorable Cornelia G. Kennedy, United States District Judge for the Eastern District of Michigan, this 26th day of June, 1973.

Henry R. Hanssen, Clerk
United States District Court
/s/ (Illegible)
Deputy Clerk

Supreme Court, U. S.
FILED
MAY 4 1978
MICHAEL RODAK, JR., CLERK

No. 77-1195

In the Supreme Court of the United States

OCTOBER TERM, 1977

WALTER WOLAK, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JOSEPH S. DAVIES, JR.,
ELLIOTT SCHULDER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

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WALTER WOLAK, JR., PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. A1) is not reported. The memorandum opinion of the district court (Pet. App. A2-A4) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1978. The petition for a writ of certiorari was filed on February 23, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a writ of *habeas corpus ad prosequendum* issued by a federal court to state authorities, directing the production of a state prisoner for trial on federal criminal

charges, constitutes a "detainer" and a "written request for custody" making applicable the terms and conditions of the Interstate Agreement on Detainers Act.

2. Whether petitioner, who entered a guilty plea to charges in a superseding indictment, may raise his claim under the Agreement for the first time in a motion to vacate sentence under 28 U.S.C. 2255.

STATUTES INVOLVED

1. Section 2 of the Interstate Agreement on Detainers Act, 84 Stat. 1397-1402, 18 U.S.C. App., pp. 1395-1398, provides in pertinent part:

Article II

As used in this agreement:

(a) "State" shall mean a State of the United States; the United States of America * * *

* * * * *

Article IV

(a) The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State made available in accordance with article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated: * * * *And provided further,* That there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

* * * * *

(e) If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

* * * * *

Article V

(a) In response to a request made under article III or article IV hereof, the appropriate authority in a sending State shall offer to deliver temporary custody of such prisoner to the appropriate authority in the State where such indictment, information, or complaint is pending against such person in order that speedy and efficient prosecution may be had. * * *

* * * * *

2. 28 U.S.C. 2241 provides in pertinent part:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.* * *

* * * * *

(c) The writ of habeas corpus shall not extend to a prisoner unless—

* * * * *

(5) It is necessary to bring him into court to testify or for trial.

* * * * *

STATEMENT

1. In an indictment (No. 48565) filed in the United States District Court for the Eastern District of Michigan, petitioner was originally charged with possession and sale of heroin and conspiracy to possess and sell heroin, in violation of 21 U.S.C. 841(a)(1) and 846. On April 19, 1973, pursuant to a writ of *habeas corpus ad prosequendum* issued by the district court, petitioner was removed from a Michigan prison, where he was serving a sentence on a state offense, and produced before the court for arraignment on the federal indictment. At arraignment the court entered a plea of not guilty for petitioner, and he was returned to the state institution on the following day (Pet. App. A2, A8).

On June 27, 1973, petitioner was again brought from state prison pursuant to a writ of *habeas corpus ad prosequendum* and produced before the district court for trial (Pet. App. A12-A17). The trial was adjourned until August 28, 1973, however, and petitioner was returned to state prison on July 6, 1973 (*id.* at A2, A15). On August 7, 1973, petitioner pleaded guilty to one count of the indictment (*id.* at A2). On October 16, 1973, he was sentenced to five years' imprisonment to be followed by three years' special parole (Pet. 3).

2. Petitioner thereafter moved to vacate his sentence under 28 U.S.C. 2255 on the ground that he had not been informed, prior to pleading guilty, that a special parole term would be imposed in addition to any custodial sentence.[1] The district court denied the motion. The court of appeals reversed, however, and remanded the case to

[1]Petitioner did not assert any violation of the Interstate Agreement on Detainers in this motion.

the district court with instructions to vacate petitioner's sentence and to permit petitioner to replead. 510 F. 2d 164.

After the remand, a superseding indictment (No. 5-80909) was filed against petitioner, charging him with possession of heroin with intent to distribute it and with conspiracy (21 U.S.C. 841(a)(1) and 846) (Pet. 3)). Petitioner pleaded guilty to the possession count of the superseding indictment on March 4, 1976; he was sentenced (*nunc pro tunc* as of October 16, 1973, the date of his initial sentence) to the same term imposed after his original guilty plea (*ibid.*).

3. On February 14, 1976, petitioner moved, pursuant to 28 U.S.C. 2255, to vacate his second sentence, arguing for the first time that his original indictment should have been dismissed with prejudice because he had been returned from federal to state custody following his arraignment on that indictment without having first been tried on the federal charges, in alleged violation of Article IV(e) of the Interstate Agreement on Detainers Act (the "Agreement") (Pet. 3; Pet. App. A2-A3).[2] Article IV(e) provides for dismissal of charges in a receiving state unless a prisoner obtained from another jurisdiction pursuant to the Agreement is tried before his return to the sending state.[3] The district court denied the motion to vacate, concluding that petitioner had waived his non-jurisdictional claim under the Agreement by pleading guilty to the indictment (*id.* at A2-A4).

[2]Petitioner has never alleged any violation of the Agreement with respect to the proceedings under the superseding indictment.

[3]Both the United States and Michigan had joined the Agreement prior to the relevant events of this case. Interstate Agreement on Detainers Act, Sections 2-8, 84 Stat. 1397-1403, 18 U.S.C. App., pp. 1395-1398; Mich. Comp. Laws §§780.601 - 780-608 (1961).

The court of appeals affirmed. Stating that a writ of *habeas corpus ad prosequendum* is not a "detainer" under the Agreement, the court held that the terms of the Agreement did not govern petitioner's production before the district court pursuant to the *ad prosequendum* writ (Pet. App. A1).

ARGUMENT

1. The principal question presented in this case—whether the Agreement governs the transfer of a state inmate from state prison to federal court pursuant to a federal writ of *habeas corpus ad prosequendum* where no pre-existing "detainer" has been lodged against the inmate—is the same question presented in *United States* v. *Mauro*, No. 76-1596, argued February 27, 1978.[4] For the reasons stated in our brief and upon the argument in *Mauro*,[5] we believe that Article IV of the Agreement is inapplicable to transfers of state prisoners by federal writs of *habeas corpus ad prosequendum*, particularly where, as here, no detainer against the inmate has previously been filed with state prison authorities. Accordingly, if this Court reverses the decision of the court of appeals in *Mauro*, it should deny the instant petition.

2. Even if this Court were to affirm the decision in *Mauro*, however, we submit that the present petition nevertheless should be denied. Petitioner neither went to

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[4]Several petitions for writs of certiorari raising similar questions are also currently pending before this Court. See *Scallion* v. *United States*, No. 76-6559; *Kenaan* v. *United States*, No. 77-206; *Ridgeway* v. *United States*, No. 77-5252; *United States* v. *Ferro*, No. 77-326; *Randall* v. *United States*, No. 77-5582; *Cumberbatch* v. *United States*, No. 77-5590; *United States* v. *Sorrell* and *Thompson*, No. 77-593; *Chico and Colello* v. *United States*, No. 77-5706, *United States* v. *Labriola*, No. 77-1270.

[5]We are sending petitioner copies of our briefs in *Mauro* and *United States* v. *Ford*, No. 77-52, argued in tandem with *Mauro*.

trial nor took an appeal from his conviction, and his claim under the Agreement is deemed to have been waived by the entry and acceptance of his valid guilty plea. See *United States* v. *Palmer*, C.A. 3, No. 77-103, decided March 22, 1978; *United States* v. *Hill*, 564 F. 2d 1179 (C.A. 5); *Strawderman* v. *United States*, 436 F. Supp. 503 (E.D. Va.). See generally, *Tollett* v. *Henderson*, 411 U.S. 258; *Sunal* v. *Large*, 332 U.S. 174. Furthermore, we submit that, as the Second Circuit has concluded (*Edwards* v. *United States*, 564 F. 2d 652), such claims under the Agreement are not the sort of extraordinary claims that would support a grant of collateral relief under 28 U.S.C. 2255. See also *United States* v. *Chico*, 558 F. 2d 1047 (C.A. 2), petition for a writ of certiorari pending, No. 77-5706; Cf. *Davis* v. *United States*, 417 U.S. 333. Thus, even if petitioner were correct on the merits, he is not entitled to relief at this late stage.[6]

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[6]We further note that petitioner has not complained of any violations of the Agreement with respect to the superseding indictment. If this Court were to reject our other submissions and conclude that the original indictment should have been dismissed with prejudice, it should remand to the court of appeals to determine the effect of such a dismissal on the charges in the superseding indictment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DANIEL M. FRIEDMAN,
*Acting Solicitor General.**

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

JOSEPH S. DAVIES, JR.,
ELLIOTT SCHULDER,
Attorneys.

MAY 1978.

* The Solicitor General is disqualified in this case.

DOJ-1978-05